NG CHEE CHOY v. TOWARDS RAINBOW SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL SUIT NO: 28NCC-52-09-2015]
1 FEBRUARY 2016

COMPANY LAW: *Winding up – Provisional liquidator – Appointment of – Circumstances in which court would appoint provisional liquidator – Removal of petitioner as director of company without notice and in contravention of articles of association – Whether a breach of good faith – Failure to maintain mutual confidence – Exclusion of petitioner from management of company and Extraordinary General Meeting ('EGM') – Whether there was a strong prima facie case for winding up – Company affairs improperly conducted – Whether appointment of provisional liquidator warranted and justified – Companies Act 1965, ss. 218(i), (f) & 231 – Companies (Winding-up) Rules 1972, r. 35*

The petitioner and the second respondent were business associates and the only two shareholders and directors of the first respondent company. Pursuant to the *quasi*-partnership, it was the petitioner's legitimate expectation that as long as he remained a shareholder he would, *inter alia*, be assured of participation in the management and control of the first respondent in his capacity as a director. However, some time in February 2012, the second respondent had forcibly and unilaterally taken into custody possession and control of the first respondent's statutory records and documents without the knowledge and approval of the petitioner. Subsequently, the petitioner discovered that a purported extraordinary general meeting ('EGM') was convened on 22 March 2013 without notice to him and in contravention of art. 47 of the articles of association. *Vide* a purported directors' resolution after the EGM, one Norshazidar Rahim, and one Phoon Cheng Yee were appointed as additional signatories to the first respondent's cheques and other documents together with the second respondent. The petitioner alleged that the second respondent breached his legitimate expectation in participating in the financial management of the first respondent. The petitioner then presented a winding up petition pursuant to s. 218(i) and (f) of the Companies Act 1965 ('the Act') on the ground that it was just and equitable to do so because the second respondent was acting in his own interest rather than in the interest of the members as a whole. Thus, this was an application by the petitioner pursuant to s. 231 of the Act read with r. 35 of the Companies (Winding-Up) Rules 1972 for an order that one Ong Tee Chew be appointed as provisional liquidator of the first respondent pending the hearing of its petition to wind up the latter.

Held (allowing plaintiff's application):

(1) The petitioner was removed as a director in the first respondent without notice and in breach of the articles. His expulsion from the management of the first respondent does not appear to be a valid exercise of powers

conferred in terms by the articles. The articles stipulate that the quorum at any general meeting is a mandatory minimum of two members and the quorum for a director's board meeting is a mandatory minimum of two. *Prima facie* the EGM and the board resolutions were invalid and a nullity for being inquorate. The second respondent was in breach of good faith which partners owed to each other not to exclude one of them from all participation in the business on which they had embarked on the understanding that all should participate in its management. The petitioner's exclusion from participation in the conduct of the business of the partnership was a fundamental breach of the partnership obligation as people do not become partners unless they have trust and confidence in one another. It was of the essence of the relationship that mutual confidence is maintained. (para 16)

(2) The absence of any explanation from the respondents as to why the petitioner was excluded from the management and why the EGM was held in contravention of the articles of association without meeting the requisite quorum indicates that the second respondent was conducting the affairs of the first respondent casually without due regard to its constitution. The second respondent had a duty to conduct the affairs of the company properly for the benefit of both the shareholders. The removal of the right of the petitioner to be the sole joint signatory of the company cheques was also not validly done. These facts showed a strong *prima facie* case for winding up of the first respondent under paras. (f) and (i) of s. 218. (para 17)

(3) As the affairs of the first respondent were being improperly conducted by the second respondent, the appointment of a provisional liquidator was warranted and justified to preserve the assets of the first respondent pending the hearing of the winding up petition. The audited accounts of the first respondent disclosed that a sum of about RM247,816 was due to it as receivables. In any event, there would be no disruption to the business of the company by the appointment as the audited accounts demonstrated that the first respondent had ceased business. In the interim, the first respondent's assets must be preserved and protected by the appointment of a provisional liquidator. (para 18)

Case(s) referred to:
In Re Westbourne Galleries [1973] AC 360 ***(refd)***
Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors [1997] 2 CLJ 116 CA ***(refd)***

Legislation referred to:
Companies (Winding-up) Rules 1972, r. 35
Companies Act 1965, ss. 218(1)(f), (i), 231

For the petitoner - Rabinder Singh Juggeet Singh; M/s Rabin & Assocs
For the respondents - Ong Chee Keng; M/s Chew Gi Boo & Co

Reported by Suhainah Wahiduddin

JUDGMENT

SM Komathy JC:

The Application

[1] This is an application by the petitioner pursuant to s. 231 of the Companies Act 1965 read with r. 35 of the Companies (Winding-up) Rules 1972 for an order that Mr Ong Tee Chew of Messrs Kang & Cheah be appointed as provisional liquidator of the first respondent pending the hearing of its petition to wind up the latter.

The Facts

[2] The petitioner and the second respondent are the only two shareholders in the first respondent company.

[3] On 7 September 2015, the petitioner presented a winding up petition pursuant to s. 218(1)(f) and (i) of the Companies Act 1965 on the ground that it was just and equitable to do so because the second respondent was acting in his own interest rather than in the interest of the members as a whole. The petitioner then filed the present application for appointment of a provisional liquidator.

Contentions Of Parties

[4] The petitioner premised that the appointment of a provisional liquidator be on these grounds:

(a) that he and the second respondent were close friends and business associates and acquired all the shares of the first respondent from the former shareholders in 2003. They thereby became the only two shareholders and directors of the first respondent. The shares were acquired for the purpose of using the first respondent as a vehicle for carrying out renovation works of low cost houses built by a company known as Better Symbol Sdn Bhd in which both he and the second respondent were shareholders;

(b) the first respondent was in substance a *quasi*-partnership between him and the second respondent. Pursuant to the *quasi*-partnership, it was his legitimate expectation that as long as he remained a shareholder he would, *inter alia* be assured of participation in the management and control of the first respondent in his capacity as a director;

(c) the second respondent had in February 2012, forcibly and unilaterally taken into custody, possession and control, the first respondent's statutory records and documents from the company secretary's office, without the knowledge of the said company secretary and without his knowledge and/or approval as the other shareholder and director;

(d) in early October 2013, he found out that a purported Extraordinary General Meeting ("EGM") was convened on 22 March 2013, without notice to him and in contravention of art. 47 of the Articles of Association. Hence, the second respondent was the only shareholder present. At the EGM, it was purportedly resolved that:

(i) Norshazidar bt Abdul Rahim and Phoon Cheng Yee (the second respondent's daughter) be appointed as additional directors;

(ii) Liew King Chuan and Beant Singh Jessy be removed as company secretaries with immediate effect;

(iii) Ng Seik Wah and one Premjeet Kaur a/p Pertap Singh be appointed as company secretaries; and

(iv) the first respondent's address be changed;

(e) as he was not notified of the EGM, he did not attend the same and could not take any steps to stop the said unlawful 'one member' meeting held in contravention of art. 47 of the Articles of Association;

(f) thereafter the second respondent and Ng Seik Wah verified the minutes of the purported EGM. Ng Seik Wah then signed and filed Forms 44, 49 and 48A to effect the purported change to the first respondent's registered address, board directors and company secretaries;

(g) the said Form 49 falsely stated that he had resigned on 2 May 2013, when in fact he did not;

(h) *vide* a purported directors resolution after the EGM, Norshazidar bt Abdul Rahim and Phoon Cheng Yee were appointed as additional signatories to the first respondent's cheques and other documents pertaining to its banking transaction together with the second respondent, with any two to sign;

(i) he alleged that the purported change in bank signatories was done with the sole purpose and intention of denying his control over the financial management of the company. He further alleged that the second respondent breached his legitimate expectation in participating in the financial management of the first respondent;

(j) on 29 November 2013, he lodged a police report complaining about the events and a letter ("admission letter") dated 30 March 2005 that was purportedly signed by him acknowledging that he had taken advances amounting to RM485,000 from the first respondent and undertaking to resign as director and transfer his shares in the company if he failed to refund the monies by 30 June 2008. It was alleged that the signature on the document was a forgery and that he had never taken a loan from the first respondent; and

(k) he withheld the filing of the winding up petition and this application until the completion of the police investigation but decided to proceed as the same has taken too long.

[5] The respondents vehemently opposed the application and denied all the allegations made against them in their affidavits. It was averred that the winding up petition was filed by the petitioner to stifle the first respondent's efforts to recover 850,000 shares held by the petitioner in trust on its behalf in a company called Principal Properties Sdn Bhd ("Principal Properties").

[6] The respondents further averred that the petitioner had knowledge of all the events mentioned in para. 4 and the reason the company documents were taken from the former company secretary was because he was not discharging his duties. It was denied that the petitioner was no longer a cheque signatory of the first respondent. It was further alleged that the petitioner failed to repay the loan acknowledged in the letter of admission, and was consequently as agreed required to resign as director and transfer his shares to the second respondent. He therefore had no *locus standi* to bring this action.

[7] The respondents contended that the petitioner had failed to offer proof of sufficient ground for the appointment of a provisional liquidator. The winding up petition and the application for the appointment of a provisional liquidator were an abuse of the process of the court.

The Law

[8] The court has the power pursuant to s. 231 of the Companies Act 1965 to appoint a provisional liquidator. Section 231 reads:

> The court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

[9] Section 231 gives the court wide and complete discretion whether or not to appoint a provisional liquidator. After the presentation of a winding up petition and pending its hearing, an application may be made for the appointment of a provisional liquidator. The exercise of the power to appoint provisional liquidator is a serious intrusion on the company and disrupts the company. It gives the provisional liquidator interim control of the company and will only be made where the reason for the appointment is consistent with maintaining the *status quo*. The power to appoint is a broad one and its exercise cannot be restricted to fixed categories. A provisional liquidator will not be appointed merely because the company is insolvent, but the fact that the company is shown to be insolvent is a relevant consideration. In considering whether to allow the appointment of a provisional liquidator the

court, *inter alia*, considers whether the assets are likely to be dissipated in the interim period between the petition to wind up and the winding up order being made and whether the affairs of the company are conducted properly for the benefit of the shareholders.

[10] There are no criteria set out in s. 231 as to when an appointment may be made. Case law has established that the court will not permit a provisional liquidator to be appointed unless there is a reasonable prospect that a winding up order will be ultimately made and the petitioning creditor has adduced evidence to show there is a need for an interim control of the company pending winding up. This is illustrated by the judgment of the Court of Appeal In *Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors* [1997] 2 CLJ 116, wherein it was stated:

> A Court will not appoint a provisional liquidator upon the presentation of a winding up petition unless there is good *prima facie* evidence that the company will be wound up because the company is obviously insolvent or the company's assets are in jeopardy or there are other circumstances which make it imperative for the Court to intervene … In *Ebrahimi v. Westbourne Gallaries Ltd & Ors* [1973] AC 360 at p 379 Lord Wilberforce said:
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> > Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles.
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> Where a company is in substance an incorporated partnership, a winding up order may be made under the just and equitable rule in situations where a partnership may be dissolved by the Court. Therefore, the mere fact that a company is in substance an incorporated partnership is not enough. There must be something more. There must be shown situations which will enable the winding up Court to exercise its equitable jurisdiction to order the partnership-like company to be wound up. In the present case, there were no such situations shown. There merely was an allegation that the company was in substance an incorporated partnership.
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> The primary facts alleged in the petition in the present case fall far short of the *prima facie* case required to support a conclusion that the company will be wound up. Mere apprehensions of mismanagement are not enough. There was no uncontested evidence on which it could be said that the appointment of an interim receiver was in any way justified. Therefore, this Court opines that on the evidence before him, the Judicial Commissioner correctly dismissed the application.

Applied To This Case

[11] The application to wind up the first respondent is premised on paras. (f) and (i) to s. 218(1) of the Companies Act which read:

> (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or

in any other manner whatsoever which appears to be unfair or unjust to other members; A

(i) the court is of opinion that it is just and equitable that the company be wound up;

[12] It is important to note that the second respondent has made an admission in his affidavit that the first respondent was acquired from the former shareholders as a joint venture between him and the petitioner. A joint venture is akin to a *quasi*-partnership. It is clear from the decision in *Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors* (*supra*) that a company that is in substance a *quasi*-partnership company, a winding up order may be made under the just and equitable rule applying partnership principles. B C

[13] The reference to *quasi*-partnership was first made by the House of Lords in *In Re Westbourne Galleries* [1973] AC 360. It would be useful to state the facts of the case. The appellant and Nazar were partners in a business as dealers in carpets. They formed a private company to take the business over. The appellant and Nazar were its first directors. The articles of association provided that the company in general meeting had express power to remove a director by an ordinary resolution. Nazar's son was subsequently appointed as a director. In 1969, after disagreement between the appellant and Nazar, an ordinary resolution was passed by the company in a general meeting by the votes of Nazar and his son removing the appellant as director. The appellant petitioned for an order for Nazar and his son to purchase his shares in the company or sell their shares to him, alternatively for an order that the company be wound up. The trial judge declined to make an order for the purchase of the shares but held that a case for winding up had been made and wound up the company. The Court of Appeal allowed an appeal by Nazar and the company on the ground that the appellant had failed to show that his removal was not justified and in the best interests of the company. The appellant appealed to restore the decision of the trial judge. D E F

[14] In allowing the appeal, the House of Lords observed: G

..that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it *inter se* were not necessarily merged in its structure that, while the "just and equitable" provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way ... that, in the present case, the appellant and N had joined in the formation of the company on the basis that the character of the association *viz*, *inter alia*, that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same; and that, N having in effect repudiated that relationship and the appellant having lost his right H I

A to a share in the profits and being in that respect at the mercy of N and G and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company.

[15] The case demonstrates that where the relationship between shareholders in a company is premised on a degree of mutual confidence and trust, the B court may order the winding up of the company on the just and equitable ground where one or more of the shareholders and/or directors exercise their powers in a manner which is inconsistent with that relationship.

[16] The uncontested facts in the present case show that the petitioner was removed as a director in the first respondent without notice and in breach C of the articles. His expulsion from the management of the first respondent does not appear to be a valid exercise of powers conferred in terms by the articles. The articles stipulate that the quorum at any general meeting is a mandatory minimum of two members and the quorum for a director's board meeting is a mandatory minimum of two. *Prima facie* the EGM and the board D resolutions are invalid and a nullity for being inquorate. The second respondent was in breach of the good faith which partners owed to each other not to exclude one of them from all participation in the business on which they had embarked on the understanding that all should participate in its management. The petitioner's exclusion from participation in the conduct of E the business of the partnership is a fundamental breach of the partnership obligation as people do not become partners unless they have trust and confidence in one another. It is of the essence of the relationship that mutual confidence is maintained.

[17] The absence of any explanation from the respondents as to why the F petitioner was excluded from the management and why the EGM was held in contravention of the Articles of Association without meeting the requisite quorum indicates that the second respondent is conducting the affairs of the first respondent casually without due regard to its constitution. The second respondent has a duty to conduct the affairs of the company properly for the G benefit of both the shareholders. The removal of the right of the petitioner to be the sole joint signatory of the company cheques was also not validly done. These facts show a strong *prima facie* case for winding up of the first respondent under paras. (f) and (i) of s. 218.

[18] As the affairs of the first respondent are being improperly conducted H by the second respondent, I think in the circumstances the appointment of a provisional liquidator is warranted and justified to preserve the assets of the first respondent pending the hearing of the winding up petition. The audited accounts of the first respondent disclose that a sum of about RM247,816 is due to it as receivables. In any event, there would no disruption to the business I of the company by the appointment as the audited accounts demonstrate that the first respondent has ceased business. In the interim, the first respondent's assets must be preserved and protected by the appointment of a provisional liquidator.

[19] There are two other matters. The first has to do with the contention by the respondents that pursuant to the terms of the letter of admission dated 30 March 2005, the petitioner had no *locus standi* to file this petition. As the petitioner was a registered shareholder at the time of the filing of the petition, he has *locus standi* to present the petition.

[20] The second has to do with the *bona fides* of the petitioner in presenting the winding up petition. The respondents alleged that it was presented to deny the first respondent's right to the shares in Principal Properties. But, it is common ground that the first respondent is now a registered shareholder of 850,000 shares in Principal Properties by virtue of a judgment granted in its favour. In the circumstances, the complaint is without basis.

Conclusion

[21] In the circumstances, I allow the plaintiff's application and order that Mr Ong Tee Chew of Messrs Kang & Cheah be appointed as provisional liquidator pending the decision in this winding up petition. Costs shall be in the cause.